No. 92-1239

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

J. E. B.,
*Petitioner,*

v.

T. B.,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ALABAMA

## RESPONDENT'S BRIEF ON THE MERITS

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## QUESTION PRESENTED FOR REVIEW

1. WHETHER A MALE DEFENDANT IN AN ACTION FOR DETERMINATION OF PATERNITY HAS THE RIGHT, UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO CHALLENGE THE PLAINTIFF'S USE OF ITS PEREMPTORY JURY STRIKES WHICH EXCLUDE MALES FROM THE JURY.

## PARTIES IN COURT BELOW

**Petitioner:** *J. E. B.*

**Respondent:** *State of Alabama ex rel. T. B.*



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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA**

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## STATEMENT OF JURISDICTIONAL GROUNDS

The Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The Petitioner claims that the holding of the Circuit Court of Jackson County, Alabama, affirmed by the Alabama Court of Civil Appeals, with certiorari denied by the Alabama Supreme Court, denies him his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

This action was initiated pursuant to Title IV-D of the Social Security Act. (C.R. 43.) Pursuant to that act the State of Alabama ex rel. T. B. filed a civil paternity action in the District Court of Jackson County, Alabama, alleging J.E.B. to be the father of T.B.'s son. (C.R. 2-3.) The result of an HLA tissue test performed at the request of the Defendant showed a cumulative probability of paternity of 99.92% and a cumulative paternity index of 1,324 to 1. (C.R. 9.) Following a hearing the District Court adjudicated paternity and set an amount of child support. (C.R. 18.) J.E.B. then filed a notice of appeal to the circuit court for a trial de novo and a jury trial. (C.R. 1.)

The case was called for trial on October 21, 1991 and the jury was selected by the struck jury method pursuant to Rule 47, Alabama Rules of Civil Procedure. The venire from which the jury was selected consisted of thirty-six people, of whom twenty-four were female and twelve were male. (J.A. 32.) Two men and one woman were excused for cause by the Court, leaving twenty-three women and ten men from whom to choose a jury. The parties struck by turns, with the Defendant having the first and last strikes. The State used its fourth strike to remove a woman from the jury, but its other nine strikes were used against men. Defendant J.E.B. used his first ten strikes to eliminate women from the jury, and exercised his eleventh strike to eliminate the last remaining male. (J.A. 32.)



Following the striking of the jury, J.E.B. challenged the Plaintiff's strikes based on *Batson v. Kentucky*, which he stated that he understood was applicable to gender-based strikes as well as to strikes based upon race. (J.A. 22.) He also stated that the venire was made up of approximately 75% women. The Court denied the challenge. (J.A. 22.) The Court then stated for the record that there had originally been sixty-two persons in the venire and that the Court had instructed the clerk "to take every other name until we got thirty-six. That's the way these people wound up where they are." (J.A. 23.)

The case was then tried, the jury returned a verdict finding J.E.B. to be the father of the child, and the trial court entered a judgment accordingly. (J.A. 24.) A final order fixing child support at $415.71 per month pursuant to the Alabama Child Support Guidelines was entered on November 8, 1991. (C.R. 39.)

Following the denial of his post-judgment motion, J.E.B. appealed to the Alabama Court of Civil Appeals. (C.R. 64.) As one of his issues he claimed that he should have been allowed to challenge the State's peremptory jury strikes, which he claimed were based solely upon gender and violated his rights to equal protection of the law. The Court of Civil Appeals affirmed the trial court's judgment, noting that the Alabama Supreme Court had declined to extend the *Batson* rule to gender-based strikes in a series of cases decided by the Alabama Court of Criminal

Appeals, the most recent one being *Murphy v. State*, 596 So.2d 42 (Ala.Cr.App. 1991), *writ denied*, 596 So.2d 45 (Ala. 1992), *cert. denied*, 113 S.Ct. 86 (1992). (J.A. 37.) The Court of Civil Appeals subsequently denied J.E.B.'s application for rehearing (J.A. 41), and the Alabama Supreme Court denied his petition for writ of certiorari on October 23, 1992. (J.A. 43.)

## SUMMARY OF ARGUMENT

Equal protection principles are not violated when litigants exercise their peremptory jury strikes, as long as those strikes are not based solely on the race of the venireperson being struck. The rule set out in *Batson v. Kentucky* and its progeny is a product of the unique history of racial discrimination in this country. *Brown v. North Carolina*, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring). While classifications based upon gender are entitled to an intermediate, heightened standard of review, they are not subject to the strict scrutiny applied to race-based classifications. The state's substantial interest in exercising its peremptory strikes freely in attempting to establish the paternity of its children born out of wedlock, in light of historical prejudice against such children and their mothers, clearly meets the standard of heightened scrutiny to which gender classifications are subjected.

If the rule of *Batson v. Kentucky* were to be applied to gender-based strikes, as well as race-based strikes, every jury venire would be made up



of four or more sub-classes: white males; white females; non-white males, which class might be further divided based upon the racial makeup of the non-white members of the venire; and non-white females, likewise subject to further subdivision. In addition, once *Batson* was extended to apply to a classification subject to intermediate scrutiny, there would be no basis for not applying it to alienage, national origin, and other matters involving rights protected by the Constitution, as well as to illegitimacy. All these classifications are entitled to strict or intermediate scrutiny for Fourteenth Amendment purposes. It would quickly become impossible to select a jury without the litigants' having to be prepared to explain every jury strike. If an explanation is required, such strikes are no longer peremptory. Such a system would result in more appeals to circuit court for trials de novo, longer trials, and more appeals to the appellate courts.

In cases where it has been shown that prior discrimination based on gender has existed, such as paternity cases and rape prosecutions, it is vitally important that both parties should be able to exercise their peremptory strikes freely in order to eliminate extremes of partiality on both sides. *Holland v. Illinois*, 493 U.S. 474, 484 (1990). Children born out of wedlock and their mothers should not be denied this protection.

Finally, if this Court should decide that the *Batson* rule does apply to gender-based jury strikes, such a decision should have purely prospective

application. The new application of *Batson* would be an extension of the rule which could not have been foreseen by the parties. Application of the rule to the present case would not further the interest of overcoming historic discrimination against women, since the Petitioner in this case alleges discrimination against men. Pure prospective application would not harm the Petitioner, since a remand for new trial will only postpone the inevitable conclusion, that the Petitioner is the father of T.B.'s child. T.B. and the child, however, would continue to suffer the deprivation of support and, thus, would be harmed by such a retrial.

## ARGUMENT

### I. THE EQUAL PROTECTION PRINCIPLES SET OUT IN *BATSON V. KENTUCKY* AND ITS PROGENY DO NOT PROHIBIT PEREMPTORY CHALLENGES BASED UPON A PERSON'S GENDER.

In presenting this argument the Respondent notes that there is no evidence in the record of this case to indicate that the male members of the jury venire were struck because of their gender. Unlike the case of *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App.), *writ denied*, 587 So.2d 1039 (Ala. 1991), *cert. denied*, 112 S.Ct. 1486 (1992), a capital murder case in which the prosecutor acknowledged that he struck females because of his preference for male jurors in a capital case, the plaintiff's attorney in this case was not required to explain his reasons



for striking the males. It is possible that, had he been required to do so, he could have presented gender-neutral reasons for his strikes, even though he would have had no forewarning that such an explanation might be necessary.

Such an explanation is not required under the equal protection principles of the Constitution as decided in *Batson v. Kentucky*, 476 U.S. 79 (1986). When State actions are taken based upon race, alienage, or national origin, or when State actions impinge upon personal rights protected by the Constitution, this Court subjects those actions to strict scrutiny, and the actions "will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). While classifications based on gender call for a heightened standard of review, that standard is not as strict as the one applying to race. A gender classification will survive if it is substantially related to a sufficiently important governmental interest. Id. at 441; *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). A similar test has been applied to classifications based upon illegitimacy, which "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 441 (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)). See also *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

In applying strict scrutiny in *Batson* to hold that peremptory jury strikes used by a prosecutor

in a criminal case could not be based solely upon race, this Court drew its opinion narrowly. Since 1986 this Court has extended the *Batson* rule to cases in which the strikes were exercised against racial groups not of the same race as the defendant (*Powers v. Ohio*, 111 S.Ct. 1364 (1991)), to civil actions (*Edmonson v. Leesville Concrete Company*, 111 S.Ct. 2077 (1991)), and to cases in which racially discriminatory strikes were exercised by the defendant in a criminal case. *Georgia v. McCollum*, 112 S.Ct. 2348 (1992).

However, this Court has consistently declined to extend the holdings of Batson beyond the realm of race. *See, e.g., United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 989 (1992); *Murchu v. United States*, 926 F.2d 50 (1st Cir.), *cert. denied*, 112 S.Ct. 99 (1991); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed*, 489 U.S. 1094 (1989), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *Murphy v. State*, 596 So.2d 42 (Ala.Cr.App. 1991), *writ denied*, 596 So.2d 45 (Ala.), *cert. denied*, 113 S.Ct. 86 (1992); *Fisher v. State, supra*; *Daniels v. State*, 581 So.2d 536 (Ala.Cr.App. 1990), *writ denied*, 581 So.2d 541 (Ala.), *cert. denied*, 112 S.Ct. 315 (1991). As pointed out by Justice O'Connor in her concurrence with this Court's denial of certiorari in *Brown v. North Carolina*, 345 S.E.2d 393 (N.C. 1986), *cert. denied*, 479 U.S. 940 (1986), the *Batson* rule on the exercise of peremptory challenges does not apply "[o]utside the uniquely sensitive area of race," beyond which "the ordinary



rule that a prosecutor may strike a juror without giving any reason applies." *Brown v. North Carolina*, 479 U.S. at 942 (O'Connor, J., concurring.)

While there is indeed an extensive history of gender discrimination in this country, it has never reached the level of discrimination which has historically been exercised against African-Americans, and has not given rise to the strict scrutiny of gender classifications which is granted to racial classifications. Moreover, gender discrimination has historically been directed against women, and not against men. J.E.B. should not now be able to claim heightened protection for men in a realm in which such protection has thus far not been granted to women.

Even though J.E.B. may have his cause examined with heightened, intermediate scrutiny, the State's substantial interest in exercising its peremptory strikes freely in establishing paternity of children withstands such scrutiny, particularly considering the history of discriminatory attitudes toward not only illegitimate children,[1] but also toward the women who bear them. Both the Plaintiff (State ex rel. T.B.) and the Defendant (J.E.B.) in this civil case used the vast majority of their jury strikes against people of one gender: the Plaintiff against men, the Defendant against

[1] See *Clark v. Jeter, supra*; *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

women. The actions of both parties constitute State action,[2] and are entitled to the same level of scrutiny. The actions of both parties may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.[3] Using gender-based strikes in cases in which gender-based differences in attitudes have been shown is not discrimination based upon "archaic and over-broad generalizations" about gender [*Craig v. Boren*, 429 U.S. 190, 198 (1976) (citing *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)) (internal quotation marks omitted)], or on "outdated misconceptions concerning the role of females in the home rather than in the market-place and world of ideas" (*id.* at 199 (internal quotation marks omitted)), or reflecting "outmoded notions of the relative capabilities of men and women." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 441. Rather, it is a reflection of a reasonable perception by both parties, based upon historical discrimination against children born out of wedlock and their mothers by a male-dominated society.

Appellate courts throughout the United States, both state and federal, which have considered this issue are divided as to whether the rule set out in *Batson* should be extended to reach gender-based strikes. In the federal appellate courts the 9th Circuit has chosen to apply the *Batson* rule to such strikes. *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992). However, the other federal appellate courts which have considered the issue have declined to make such an extension. *See United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *United States v. Nichols, supra*; *United States v. Hamilton, supra*. *See also United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986) *cert. denied*, 481 U.S. 1037 (1987) (holding that black males do not "constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws not simply as blacks, but as black males," and therefore do not constitute a "cognizable racial group" for purposes of *Batson*).

As shown, this Court has on numerous occasions denied certiorari to consider this issue in

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[2] *Edmonson v. Leesville Concrete Company, supra; Georgia v. McCollum, supra.*

[3] As pointed out in the amicus brief filed by the Solicitor General, studies have indicated that in certain types of cases there does appear to be a gender-associated difference in attitudes among jury members. *See* Reid Hastie, Steven D. Penrod and Nancy Pennington, *Inside the Jury* 140, 141 (1983). where it is noted that "female jurors appear to be somewhat more conviction-prone than male jurors" in rape cases, while males "were more inclined to think that a rape victim made a casual contribution to the rape, attributed more fault to the victim, and characterized her more negatively" than did females.

criminal cases. The case now before this Court is a civil paternity action. The state's substantial interest in being able to exercise its peremptory strikes in a manner which promotes its important governmental interest in establishing paternity of this child, who is himself entitled to heightened protection because of past discrimination, clearly meets the "heightened scrutiny" test which J.E.B. is entitled to have applied. Equal protection was not denied J.E.B. by the Respondent's strikes.

## II. THE EXTENSION OF BATSON TO GENDER-BASED STRIKES WOULD LEAD TO THE EROSION AND ULTIMATELY TO THE DEMISE OF PEREMPTORY CHALLENGES.

As previously pointed out, strict scrutiny has been applied to equal protection questions not only in the matter of race, alienage, or national origin but also in matters involving other fundamental constitutional rights. *See Cleburne*, 473 U.S. at 440. If the *Batson* rule is applied to require gender-neutral reasons for exercising a "peremptory" strike, then it must be applied to all the classifications entitled to strict scrutiny.[4] An argument could readily be made for religion-neutral reasons, so that a lawyer defending a DUI suspect could not strike a member of a local church

[4] In *Murchu v. United States*, 926 F.2d 50 (1st Cir.), *cert. denied*, 112 S.Ct. 99 (1991), the First Circuit Court of Appeals declined to recognize Americans of Irish ancestry as a "cognizable group" for purposes of *Batson*.



which the lawyer knows to advocate total abstinence with regard to liquor as part of its religious teaching, without presenting a religion-neutral reason therefor.

Likewise, since both gender and illegitimacy are entitled to an intermediate, "heightened" level of scrutiny, an argument could be made that a party to a paternity action could not strike people who had been born out of wedlock or people who had borne such a child unless there was a reason unrelated to the question of illegitimacy. Such a result would clearly put a defendant in the case at a disadvantage.

In addition, although heightened scrutiny has not yet been applied to age, laws have been passed to prevent age discrimination in many contexts. Therefore, it could readily be argued that in a criminal action against a nineteen year old defendant for possession of marijuana the prosecutor should not be able strike younger venire members, who might be perceived as having a more permissive attitude toward the crime, unless there was an age-neutral reason for the strike. Likewise, it could be argued that the defendant's attorney in the same case could not attempt to remove older venire members, who might be expected to be less tolerant of the alleged crime, without an age-neutral reason. While age is not immutable in the same way that race is, remaining the same throughout a person's life, it is clearly immutable at any particular point in time in which a person may be reporting for jury duty, and one's

age at such a time certainly results from an "accident of birth." *Georgia v. McCollum*, 112 S.Ct. at 2359. Therefore, if *Batson* were extended to gender-based strikes under intermediate scrutiny, age-discrimination would invite further extension.

One commentator advocates that *United States v. DeGross, supra*, which extends the *Batson* rule to gender-based strikes, should be applied to all groups which receive heightened scrutiny in equal protection cases.[5] In so doing, he argues that peremptory challenges would not be made unavailable by suggesting that such factors as personality, responsiveness, being a leader or follower, inattentiveness, inability to comprehend issues in a complicated case, or other reasons would still be available.[6] The flaws in that argument are apparent. First, many of the reasons he says are still available could easily be declared a sham to justify an otherwise impermissible strike. Secondly, the very fact that any reason is required shows that the strike is no longer peremptory. Peremptory challenges, by definition, are not subject to the requirement of an explanation. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

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[5] Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying United States v. DeGross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 Minn.L.Rev. 689 (1993).

[6] *Id.* at 715-718.



This Court has noted the importance of the position in this country's trial procedures of the peremptory challenge. *Holland v. Illinois*, 493 U.S. 474, 484 (1990). An extension of the *Batson* rule beyond the realm of racial strikes would effectively "cripple the device of peremptory challenge." *Id.* By requiring a party to be able to articulate one of the acceptable reasons with regard to his or her peremptory strikes effectively makes them non-peremptory, simply creating a level of "cause" which does not reach the level of "for cause."

In the present case race was not an issue, and there is no indication in the record how many persons in the jury venire were members of a racial minority. In addition, the venire in this case was unusually disproportionate with regard to men and women.[7] Many counties in Alabama have non-white populations accounting for thirty to seventy percent of the total.[8] Thus, it is common for a venire to be somewhat equally divided between whites and non-whites as well as between men and women.

In Alabama statistical evidence, while by no means conclusive, is highly significant in establishing a prima facie case of discrimination.

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[7] J.E.B. raised no objection pursuant to the Sixth Amendment that the venire from which the jury was chosen in this case failed to represent a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522 (1975).

[8] *Alabama County Data Book 1992-93*, published by the Alabama Department of Economic and Community Affairs, State of Alabama.

*See Harrell v. State*, 555 So.2d 263 (Ala. 1989). *See also Ex parte Branch*, 526 So.2d 609 (Ala. 1987). If a party uses peremptory strikes to eliminate African-Americans from the jury and the resulting number of African-Americans actually sitting on the jury is a smaller percentage than was on the venire, the party issuing the strikes may be subject to being required to explain those strikes on a race-neutral basis at a *Batson* hearing. If the rule of *Batson* were extended to gender-based strikes, it is likely that the same tests for a prima facie case would be applied. This would inevitably result in subclasses of non-white women and non-white men, which could be subject to further subdivision, depending on the racial makeup of the individual non-white venirepersons.

Moreover, the Alabama Supreme Court has recently taken the position that the safeguards which apply to minority races under *Batson, Edmonson v. Leesville Concrete Company, and Georgia v. McCollum* also apply to whites. *See White Consolidated Industries, Inc. v. American Liberty Insurance Company*, 617 So.2d 657 (Ala. 1993). Therefore, extending *Batson* to gender-based strikes would create an additional two subclasses, made up of white women and white men. Hypothetically, if a jury venire of forty persons happened to be composed of nine black men, ten black women, thirteen white men, and eight white women, a party exercising strikes against members of any of the subclasses which failed to result in a twelve person jury consisting of three black men, three black women, four white men, and two white



women, could find himself in a position of having to justify those strikes on a race-neutral and gender-neutral basis. While the reasons would not have to rise to the level of "for cause," still it is clear that an explanation could be required, eliminating the peremptory nature of the strikes.

The case of *United States v. DeGross, supra*, in which the Ninth Circuit applied the *Batson* rule to both the defendant's strikes against men and the prosecutor's strikes against women, is illustrative of one of the very real and practical problems involved in such an application. In *DeGross*, when the female defendant exercised a peremptory challenge against a male, the prosecutor objected that the defendant was removing male venirepersons in violation of their equal protection rights. The defendant had previously struck seven males. When *DeGross* could not justify her challenge on gender-neutral grounds, the court disallowed that challenge.

Later during jury selection, when there were ten women and two men seated in the jury box and six women and one man remaining in the venire, the defendant objected to the prosecutor's peremptory challenge of a Hispanic woman. When required to justify the challenge, the prosecutor said that his main reason for the challenge was to achieve "a more representative community of men and women on the jury." *DeGross*, 960 F.2d at 1436. The court accepted the explanation and allowed the strike.

The defendant was convicted, and appealed. On appeal the Ninth Circuit held that the gender-based strike of the defendant was properly disallowed, but reversed and remanded the case, holding that the government's challenge of a woman in order to keep "a more representative community of men and women" was, itself, a gender-based challenge, and should have been disallowed.

The method of choosing the jury in the Ninth Circuit is not clear from the opinion. Therefore, it is not clear whether the prosecutor could simply have declined to challenge anyone. However, in a struck jury system such as is used in Alabama, it is necessary for the litigants to strike alternately until twelve people remain, who then constitute the jury. See Rule 47, Alabama Rules of Civil Procedure. Thus, in a fact situation such as existed in *DeGross*, if the *DeGross* rule were applied and the prosecutor had no gender-neutral reason for striking any of the remaining venirepersons, the prosecutor would be caught in a Catch 22. If he struck a female the strike would not be allowed for lack of a gender-neutral reason, so he must strike the sole remaining male, thus assisting the defendant in removing males from the jury.[9]

The absence of published studies indicating

[9] It is obvious that striking a male in order to avoid a challenge based on gender constitutes a gender-based strike. However, in the fact situation presented, there is very little likelihood that the defendant would object to it.



problems among the courts in states applying the rules of *Batson* and its progeny to gender-based jury strikes does not prove that there are no problems. Alabama courts have wholeheartedly adopted the mandates of *Batson*, *Edmonson v. Leesville Concrete Company*, *Powers v. Ohio*, and *Georgia v. McCollum* as they apply to race. *See, e.g., Bush v. State*, 615 So.2d 137 (Ala.Cr.App. 1992). However, the mandates of those cases continue to raise practical problems in courts attempting to apply them during the course of litigation. More than forty cases raising issues relating to the use of peremptory jury strikes were considered and addressed by the appellate courts of Alabama during 1992. Applying the race-based jury strike rules to questions of gender would multiply the problems exponentially, slowing down litigation at every level of the proceedings.

According to the Division of Statistical Analysis in the Center for Health Statistics, Alabama Department of Public Health, there were 62,226 births in Alabama in 1992. Of this number 20,263, or approximately 32.6 percent of the total, were out-of-wedlock births. 1992 was the sixteenth consecutive year that a new record was set in Alabama with regard to out-of-wedlock births as a percentage of the total number of births. During 1992, Alabama's Title IV-D program was successful in establishing slightly over 8,000 paternities. In addition to the paternities established through the state's Title IV-D program, a small number of paternities are established each year through private court actions. Even so, the number of

children for whom paternity needs to be established and support obtained is constantly increasing.

Presently the vast majority of paternities established in Alabama are by agreement of the parties. Many more are disposed of at the juvenile or district court level after a non-excluding blood test is obtained. Up to now only a relatively small percentage of total cases have been brought to the circuit court for a jury trial. However, if the rule sought by the petitioner were to be imposed, the prospect of a jury trial would be very appealing to a defendant contesting paternity. At the very least, the trial itself could be expected to take much longer than previously. The voir dire of prospective jurors would take longer than at present, having to be detailed enough for both parties to be prepared to justify each of their jury strikes. In addition, it could be anticipated that a hearing would be required in practically every paternity case in which the chosen jury did not reflect the racial *and* gender makeup of the original venire in order for the litigants to articulate the reasons for their strikes. It is foreseeable that many of these cases would result in appeals questioning whether a prima facie case had been made for discrimination or whether the articulated reasons for the peremptory strikes were acceptable. The result of this process would be the increase of paternity cases in both the circuit courts and the appellate courts, slowing down and hindering the effectiveness of the state's efforts to establish paternity and secure support for its children, even if the state were ultimately successful in a given



case.[10]

While the Respondent has cited statistics only as they relate to paternity actions, a similar result could be expected with regard to certain criminal actions, such as rape. While this Court in *Batson*, 476 U.S. at 99, rejected Kentucky's suggestion that its holding would create serious administrative difficulties, the Respondent submits that *any* difficulties created by Batson would be greatly compounded by the imposition of the additional requirements sought by the petitioner. Such an imposition is not required in this case, since no violation of J.E.B.'s Fourteenth Amendment rights has been shown. The principles of *Batson* should not be extended as requested by the petitioner.

## III. IF THIS COURT SHOULD DECIDE TO EXTEND THE BATSON RULE TO ENCOMPASS GENDER-BASED STRIKES, SUCH A RULING SHOULD HAVE PURELY PROSPECTIVE APPLICATION.

[10] The complaint for paternity and child support filed in the present case was signed by T.B. on October 20, 1989. A judgment of paternity and a support order were issued by the district court on October 22, 1990. (C.R. 18.) However, by filing a supersedeas bond with his appeal to circuit court for a trial de novo (C.R. 1) and again with his appeal to the Court of Civil Appeals (C.R. 64), J.E.B. has successfully avoided paying any support for his now four-year-old child, who was only five months old when the action began.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), which raised the question whether the *Batson* rule applied retroactively, this Court held that a new rule for the conduct of criminal prosecutions was to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. *Griffith*, 479 U.S. at 328. However, at that time this Court noted that the area of civil litigation continued to be governed by *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971).

Recently, in *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993), this Court discarded the rules set out in *Chevron Oil Company v. Huson* regarding whether or not a rule in a civil case would be applied retroactively. *See also James B. Beam Distilling Company v. Georgia*, 111 S.Ct. 2439 (1991). *Harper* held that "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper*, 113 S.Ct. at 2513. *Harper* appears to leave open the possibility that this Court might still consider giving purely prospective effect to a decision, declining to apply it either to the parties before the Court or to any other case as to conduct or events occurring before that decision. *See James B. Beam Distilling Company v. Georgia*, 111 S.Ct at 2443. *See also Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 87 (1982).



*Harper* does not discuss purely prospective application of a decision, nor give any guidance as to when such application might be appropriate. In fact, as pointed out by Justice O'Connor in her dissent, the opinion contains language intimating that pure prospectivity, as well as selective prospectivity, may be barred by that decision. *Harper*, 113 S.Ct. at 2527 (O'Connor, J., dissenting).

If the possibility of pure prospective application of a decision in a civil case has not been foreclosed, such application should be adopted in the present case if this Court holds that the rules set out in Batson requiring race-neutral reasons for peremptory strikes should also apply to require gender-neutral reasons for such strikes. Such a ruling would clearly be a new principle of law which these Alabama litigants could not have foreseen,[11] since both the Alabama appellate courts and the 11th Circuit Court of Appeals have declined to so extend *Batson*, and this Court has consistently denied certiorari when petitions in such cases were filed. *See United States v. Dennis, supra; Murphy v. State, supra; Fisher v. State, supra; Daniels v. State, supra.*

Moreover, if such a decision were grounded

[11] It is again noted that the Defendant in this case, as well as the Plaintiff, exercised almost all of his peremptory strikes against venirepersons of one gender. If the state's attorney had assisted the Defendant in his endeavor to eliminate women by exercising more of its strikes against them, it is very unlikely that the case would be before this Court.

upon the historical discrimination against women which has existed in this country, application of the rule in this case would not further the goal of eliminating such discrimination, since the petitioner in this case alleges discrimination against men, not against women. Only J.E.B. could profit by an application of such a rule to require a retrial in this case, while T.B. and her child would continue to be deprived of support from the child's father.

Finally, it is clear that applying such a rule other than purely prospectively would produce substantial inequitable results. As previously pointed out, this action was filed in October 1989, when T.B.'s child was only five months old. The child passed his fourth birthday in May 1993, but he is still not receiving support from the man whom the evidence showed overwhelmingly to be the child's father. A blood test entered into evidence showed the cumulative probability that J.E.B. was the child's father to be 99.92 percent. (C.R. 9.) J.E.B. admitted having engaged in an intimate relationship with T.B. beginning in February 1988 (R.T. 153-154), which culminated in a five-day long residence with T.B. at the Econo-Lodge during the second week of August 1988, ending on August 14 of that year. T.B. gave uncontradicted testimony that no contraception was used during that week in August, which was within the period of possible conception of the child in question. (R.T. 50.) She further testified that she did not have sexual relations with anyone but J.E.B. from February 1988 until after the birth of the child in May 1989.



(R.T. 57.) J.E.B. acknowledged taking T.B. to the doctor in September 1988, when her pregnancy was confirmed. (R.T. 166.) Clearly, to apply a rule requiring a retrial in the present case, causing T.B. and her child to continue to do without support, would produce substantial inequitable and unjust results.

The foregoing discussion of prospective application of the decision is based upon the factors for consideration set out in *Chevron Oil v. Huson, supra. See also Northern Pipeline Construction Company, supra* (applying pure prospectivity). As pointed out above, to give this case pure prospective application may be completely barred by *Harper v. Virginia Department of Taxation, supra.* However, if this Court should decide to extend *Batson* to apply its rule to gender-based strikes and if *Harper* has left open the possibility of purely prospective application of such decision, then clearly a rule extending *Batson* in this case should have such application.

## CONCLUSION

The foregoing argument and authorities show that J.E.B.'s rights under the Equal Protection Clause of the Fourteenth Amendment have not been violated. The rule of *Batson v. Kentucky* should not be extended to gender-based peremptory jury challenges, and the decision below should be affirmed. However, if this Court should decide in favor of extending the *Batson* rule to gender-based strikes, such decision should be given purely prospective application in order to protect the child involved in this case and other children in like circumstance.

RESPECTFULLY SUBMITTED,

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